IN THE

SUPREME COURT OF THE UNITED STATES

NO. 82-5086

JAMES E. MESSER, JR.

vs.

WALTER D. ZANT, Warden, Georgia
Diagnostic and Classification Center

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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IN THE

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NO.

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PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

The Petitioner, James E. Messer, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on April 20, 1982.

QUESTION PRESENTED

1. Whether or not a confession taken from Petitioner following a warrantless arrest based on less than probable cause and after ninety minutes of questioning subsequent to the arrest is admissible into evidence in light of the Petitioner's rights under the Fourth Amendment of the Constitution against illegal search and seizure.

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TABLE OF AUTHORITIES

OPINION BELOW

No written opinion was rendered by the Supreme Court of Georgia. The opinion from the Superior Court of Butts County, the habeas corpus court appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 20, 1982. This petition for certiorari has been filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS

1. The Fourth Amendment Provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

STATEMENT OF THE CASE

On February 13, 1979, young Rhonda Tanner, Petitioner's niece, failed to come home from her school in Cedartown, Georgia. Joyce Tanner, the child's mother, went to the school and was told by the principal that a man who Rhonda appeared to know had picked the child up at the mother's request. (T-204) In the afternoon of February 14, 1979, Rhonda Tanner's body was found by police in a field near Old Mill Road, badly beaten and stabbed.

Shortly after finding the body on February 14th, a witness told police that on February 13th while driving on Old Mill Road near the railroad tracks she noticed a car parked on the side of the road and saw a man walking up from the tracks to the car. (T-229, 231, 232) Police took the witness by Petitioner's residence, and they identified the car by his home as being the same make, model and color as they had seen on February 13th (T-236).

At approximately 6:00 p.m. on February 14, 1979, because of the Petitioner's car being identified, three detectives, Georgia Bureau of Investigation (GBI) Agent Longino, FBI Agent Leary and Cedartown Police Officer Dean went to Petitioner's mobile home to bring Messer in. (T-322, 298) Petitioner refused to go with the officers indicating he wanted to wait until after Rhonda Tanner's funeral. (T-322) However, the officers insisted that Petitioner come to the Cedartown station immediately. (T-322,350) While the investigators allowed Petitioner and his wife to drive his own automobile in to town they insisted that FBI agent Leary also ride in the back seat of the car. The other agents followed. (T-351)

Once at the police station Petitioner was photographed, read his Miranda rights, questioned and signed a waiver consenting to the search of his home. (T-364) Petitioner was informed he was not under arrest but no investigating officer was able to answer the question of what they would have done if Petitioner tried to leave the police station. (T-297, 324)

Petitioner was not told why he was being photographed. (T-182) The police, now in possession of a picture of Petitioner, started calling in school officials to see if Messer had been to the school on February 13th. (T-193)

Initially during the interrogation, Petitioner denied killing Rhonda. (T-304) But when confronted with the fact that certain witnesses were identifying him from the photograph just taken, he broke down, started crying and confessed to the murder. (T-307) After the confession, he was informed that he should consider himself under arrest. The confession was made about ninety minutes into the interrogation. (T-313)

Petitioner was indicted by a Polk County grand jury for the crimes of murder and kidnapping with bodily injury. (R-3) Petitioner at the trial sought to suppress his confession and identification by motions to suppress which were denied. (R-17, 45; T-328) James Messer was convicted of murder and kidnapping and at the sentencing phase the jury returned a verdict of death in the electric chair. (R-74, 75)

Petitioner appealed his conviction to the Georgia Supreme Court which held on March 3, 1981, that Petitioner's confession was voluntary and affirmed his conviction and denied a motion for a rehearing. Messer v. State, 247 Ga. 316, 276 SE2d 15 (1981). Messer then filed a Petition for a Writ of Certiorari in this Court but was denied, Messer v. Georgia, 102 S Ct. 367 (No. 80-6877).

On Remittitur from the U.S. Supreme Court and the Georgia Supreme Court, the Superior Court of Polk County set the date for Messer's execution to be on January 8, 1982. However, Petitioner filed a Motion for Stay of Execution, Petition for Habeas Corpus and an Affidavit of Poverty in the Butts Superior Court on January 4, 1982. A stay of execution was granted but the Superior Court turned down the Habeas Corpus Petition on February 23, 1982. In said petition Messer raised the question of his illegal arrest, but the Habeas Court, Judge Crumbley, ruled that because findings

made by the Georgia appellate courts are binding upon the habeas court for purposes of review the allegation of error was without merit. (See appendix p. 3)

After the denial of the habeas corpus petition, Mr. Messer filed an application for a certificate of probable cause with the Georgia Supreme Court which was denied April 20, 1982. (See appendix p. 1) This question is now presented to this Court timely and properly raised.

REASONS FOR GRANTING WRIT

This case presents a clear question of constitutional significance under the Fourth Amendment of the United States Constitution. The question is whether the Petitioner's confession and other evidence gained through the illegal detention should have been suppressed as the fruit of an illegal arrest. The tria court held that the evidence was properly admitted on the basis that the confession was voluntary, because it was given after Miranda warnings; this ruling and the Georgia Supreme Court's affirmance thereof fail to take into account the holding of Brown v. Illinois, 422 US 590, to wit, that the warning required by the Miranda decision, alone and per se, cannot make a confession following an illegal arrest sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegal arrest and the confession.

The facts show clearly that Petitioner was arrested when three detectives came to his home and insisted that he accompany them to the stationhouse for questioning. Petitioner, at first, declined to go but the police demanded and permitted Petitioner to drive his own car to the stationhouse provided another police officer rode with him. The agents were acting solely on the

statement of a witness who reported seeing a car similar to the Petitioner's near the crime scene. Because there were insufficient facts to get a warrant, the police made an arrest based on mere suspicion, which cannot justify an arrest. Petitioner submits that the arresting officers knew probable cause was lacking and acted independently and without legal authority when they detained the Petitioner. The resulting investigatory exploration was detailed and with specific design. Following his arrival at the station Petitioner was quickly photographed, given Miranda warnings, interrogated and asked to consent to a search of his home.

Petitioner under complete and total control of the police confessed after ninety minutes of interrogation. The confession came after the Petitioner was told that someone had identified his photograph out of a photo lineup. The confession, the photograph and the resulting identifications must be suppressed as the fruit of an illegal arrest consistent with this Court's rulings in Taylor v. Alabama, ____ U.S. _____ 31 Cr L 3118 (June 23, 1982); Dunaway v. New York, 422 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975); and Davis v. Mississippi, 394 U.S. 721 (1969).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Georgia and the Superior Court of Butts County, Georgia.

Respectfully submitted,

HOWARD J. MANCHEL
101 Marietta Tower
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IN THE

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TO THE GEORGIA SUPREME COURT

APPENDIX

Application No. 2025

SUPREME COURT OF GEORGIA

ATLANTA, April 20, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JAMES E. MESSER, JR. V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the min[ute] of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto af[fixed] the day and year last above written.

Joline B. Williams Clerk

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JAMES E. MESSER, JR.,	:	
PETITIONER	:	
VS.	:	HABEAS CORPUS FILE NO. 5383
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
RESPONDENT	:	

ORDER

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Polk County. Petitioner was convicted of murder and kidnapping with bodily injury and received a death sentence. The Supreme Court affirmed the convictions and sentence. Messer v. State, 247 Ga. 316 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition, as amended, contains 14 numbered counts which allege substantive claims for relief. The Court will address these claims for relief by paragraphs corresponding numerically to the counts in the petition.

The record in this case consists of the affidavits of David Pasley; Bunny Sue Pasley; Rev. William McCullough; Ricky Nixon; R. L. Hicks;

Mildred Hicks; Charlie Cottle; Geraldine F. Nixon; Dorothy Sue Key; Essie Messer; Josephine Bohannon; Lettie Peters; Louie Peters; Esther Stephens; Willie F. Stephens; Oliver Smith; Lorene Davis; Myrtle Nixon; James Nixon; Mildred R. Smith; Reuben T. Messer; and Janet P. Manchel; and the record and transcript of Petitioner's trial in the Polk Superior Court.

I

In count 1, Petitioner alleges that the admission into evidence of his confession violated his Fourth, Fifth, and Fourteenth Amendment rights. Specifically, Petitioner challenges the legality of his arrest.

FINDINGS OF FACT

The Supreme Court has already decided that Petitioner's confession was admissible. Messer v. State, supra, at 319(2). In so ruling, the Court reviewed the evidence submitted to the trial court at the Jackson-Denno hearing. The Court found that Petitioner had voluntarily accompanied officers to the police station, was given Miranda warnings, signed a waiver form, confessed to the crime and was then arrested. Id.

CONCLUSIONS OF LAW

Findings of the appellate courts are binding upon this Court for the purposes of review. Elrod v. Ault, 231 Ga. 750 (1974).

In that the Supreme Court found that Petitioner's arrest followed his confession, this Court finds there was probable cause for the arrest.

Accordingly, this allegation is found to be without merit.

2

In count 2, Petitioner asserts that he was denied his right to effective assistance of counsel as guaranteed by the Sixth, Eighth, and Fourteenth Amendments and the Georgia Constitution.

FINDINGS OF FACT

Lamar Gammage and Joe Anderson were initially appointed to represent Petitioner. At their request, John E. Sawhill, III, was appointed to replace them. (Non-Jury Hearing, May 22, 1979, p. 3-5).

Among the pre-trial motions Counsel filed were motions for: a change of venue (R.5); to challenge the arrays of grand and traverse jurors (R. 8, 10); to suppress identification testimony (R. 15); to suppress Petitioner's confession (R. 17); for disclosure of photographs to be used in evidence and those used in previous photographic arrays (R. 19); for an independent psychiatric examination (R. 22); for reconsideration of the denial of an independent psychiatric exam (R. 25); a renewed motion for change of venue (R. 37) and supplementary materials (R. 53); and for individual, sequestered voir dire (R. 48).

At trial, Counsel cross-examined witnesses (T. 174; 182; 186; 211; 221; 260; 295; 315; 323; 407; 410); made motions (T. 6; 8; 13-14; 373; 498; 526); gave closing argument in the guilt/innocence phase (T. 482-484); presented one witness (T. 501) and gave closing argument in the sentencing phase. (T. 516-519).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel here easily meets the test. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case caused by Petitioner's admission of guilt. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective for failing to pursue and present effectively the special plea of insanity and an insanity defense. Contrary to Petitioner's assertions, Counsel vigorously attempted to discover evidence to support such a defense but was unsuccessful. Cf. Hesser v. State, supra, at 319(1). The decision whether to have cross-examined witnesses about Petitioner's behavior

on the day of the crime is a trial tactic which falls within the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968).

Petitioner has also claimed Counsel ineffectively presented his motions challenging the arrays of grand and petit jurors. At the hearing on the motions Counsel withdrew his challenges because the new grand jury which re-indicted Petitioner appeared to meet the requirements as to percentages of classes represented. (Motion to Challenge Array of Grand Jurors, Dec. 4, 1979, p. 14) Petitioner has made no showing that Counsel's conclusions were erroneous or that either challenge could have succeeded. Thus, the Court cannot conclude Counsel was ineffective for withdrawing his challenges.

Petitioner has also alleged that Counsel ineffectively conducted the voir dire examination by failing to correct the impression that Petitioner would have to produce evidence to establish his innocence. The trial court instructed the jurors on the presumption of innocence. (T. 85-86). The three jurors who thought Petitioner would have to prove his innocence were excused for cause. (T. 88; 107-108; 129). Petitioner has made no showing that jurors who served on the case thought he would have to prove his innocence. As a result the Court cannot conclude Counsel was ineffective for not requesting an instruction on Petitioner's right to remain silent.

Petitioner has also asserted the Counsel ineffectively presented the motion to suppress Petitoner's confession. In that Petitioner has not demonstrated the confession was inadmissible (see paragraph 1), the Court cannot find Counsel ineffective for this reason.

Petitioner has also claimed Counsel was ineffective for failing to object to the allegedly inadmissible testimony of Retha Wood and to the prosecutor's reference to this testimony in his closing argument. The Court has concluded this testimony was admissible (see paragraph 3). As to the prosecutor's characterization of Petitioner as "stalking" Ms. Wood (T. 476), Petitioner admitted in his statement that he had tried to pick her up. (T. 369). Thus, the prosecutor's comment was not a reference to facts not in evidence and not improper. Wheeler v. State, 220 Ga. 535, 537 (1965); Leutner v. State, 235 Ga. 77, 84 (1975). The Court does not find Counsel ineffective as to these allegations.

Petitioner has also contended that the jury charge on intent and malice were impermissibly burden-shifting so that Counsel's failure to object was ineffective. The Court has examined the charge complained of (T. 484-497) and found that the presumptions or inferences created as to intent were permissible ones and, therefore, not improper. Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213,

60 L.Ed.2d 777 (1979); Skrine v. State, 244 Ga. 520 (1979). Petitioner's challenge to the malice instruction was rejected in Burney v. State, 244 Ga. 33(6)(1979). Thus, the Court does not find Counsel ineffective for failing to object to proper jury instructions.

Petitioner has also claimed Counsel was ineffective for not objecting to the trial court's failure to charge the jury on the outburst of the victim's father. The trial court ordered the jury to go to the jury room and had the father removed from the courtroom. (T. 372). Counsel immediately moved for a mistrial. Id. The trial court deferred ruling on the motion but had the jury brought in and instructed them on the outburst. (T. 378-379). Counsel twice renewed his motion for a mistrial and was overruled. (T. 498; 526). The Supreme Court affirmed the denial of a mistrial. Messer v. State, supra, at 323 (6). Petitioner's allegation is without merit.

Petitioner has also complained that Counsel rendered ineffective assistance in the sentencing phase by presenting only one witness, Petitioner's mother. Petitioner has presented affidavits of twenty-one relatives and friends in support of his claim that other mitigating evidence was available but not investigated or presented. Given the nature of this case, the Court finds it is highly speculative whether such testimony could have made any difference.

For this reason the Court cannot find Counsel ineffective.

Finally, Petitioner has claimed Counsel failed to present effective closing arguments in both the guilt/innocence and sentencing phases. Current counsel's disagreement with Mr. Sawhill's decisions on what to argue cannot provide the basis for ineffective assistance. Estes v. Perkins, supra; Reid v. State, supra.

Accordingly, the Court finds this claim for relief to be without merit.

3

In count 3, Petitioner contends he was deprived of his right to a fair trial by the admission into evidence of testimony concerning other acts of alleged sexual misconduct which were irrelevant and impermissibly placed his character in issue.

FINDINGS OF FACT

The Court has reviewed the testimony of Retha Wood. (T. 164-178, 197-200). Ms. Wood testified as to her three encounters with Petitioner, two of which occurred on the day of the crime, and of her identification of him. Id. She did not testify as to any acts of sexual misconduct but that he had made her nervous and suspicious of his motives. Id. Cf. Messer v. State, supra, at 316-317.

CONCLUSIONS OF LAW

The testimony of Ms. Wood was relevant to show motive and the state of mind of Petitioner on the day

of the crime. Evidence material to the issues of the case does not become inadmissible merely because it incidentally puts a defendant's character in issue. Whippler v. State, 218 Ga. 198(3)(1962); Moses v. State, 245 Ga. 180(4)(1980). Further, any inferences the jury may have drawn from the testimony as to Petitioner's conduct were supported by his own admission that he had tried to pick her up that day. (T. 369).

Accordingly, this allegation is found to be without merit.

4

The Supreme Court has already decided the trial court did not err in denying the motion for a mistrial after the outburst of the victim's father in the courtroom. Messer v. State, supra, at 323(6).

5

The Supreme Court has already concluded the denial of a change of venue was not error. Messer v. State, supra, at 322(4).

6

In count 6, Petitioner claims that the exclusion of jurors conscientiously opposed to the death penalty violated his right to a representative, impartial jury as guaranteed by the Sixth, Eighth, and Fourteenth Amendments and the Georgia Constitution.

FINDINGS OF FACT

Juror Rufus Mitchell was excused for cause after he indicated that he could not vote for the death penalty under any circumstances. (T. 54-56).

CONCLUSIONS OF LAW

Under Witherspoon v. Illinois, 391 U.S. 510,

88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), a juror may be excluded for cause where he indicates that he would vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the trial. The Court finds that the juror was properly excluded under Witherspoon.

Petitioner's assertion that the exclusion for cause of jurors unequivocally opposed to the death penalty denied his right to an impartial jury was rejected in Smith v. Balkcom, 660 F.2d 573 (1981).

Accordingly, this allegation is found to be without merit.

7

In count 7, Petitioner alleges that the finding of the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance is unconstitutional because the jury instructions were insufficient to channel the jury's discretion or define mitigating circumstances.

FINDINGS OF FACT

The Supreme Court expressly upheld the finding of the (b)(7) aggravating circumstance in light of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Messer v. State, supra, at 325-326.

CONCLUSIONS OF LAW

Implicit in the finding that the (b)(7) aggravating circumstance was properly applied is

the conclusion that the charge sufficiently channeled the jury's discretion.

Contrary to Petitioner's assertion, there is no requirement that the entire (b)(7) aggravating circumstance be found; the terms aggravated battery, depravity of mind, or torture are disjunctive. Hance v. State, 245 Ga. 856, 861 (1980).

As to mitigating circumstances, the trial court defined mitigating circumstances and explained their function to the jury. The charge comports with Spivey v. Zant, 661 F.2d 464 (1981).

Accordingly, this allegation is found to be without merit.

8

Petitioner's challenge to the adequacy of the Georgia provisions and practices governing appellate review was rejected in Smith v. Balkcom, 660 F.2d 573 (1981).

9

Petitioner's challenge to the use of electrocution as the means by which his death sentence will be carried out is found to be without merit.

10, 11, 12

In counts 10, 11, and 12, Petitioner mounts a general attack against the constitutionality of the death penalty. Specifically, he claims that the death penalty is being arbitrarily and capriciously administered;

that his death sentence is being exacted pursuant to a pattern of Georgia authorities to discriminate on the basis of race, sex, and poverty; and that there is no theoretical justification for the death penalty.

FINDINGS OF FACT

Georgia's death penalty statute has been held constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, reh den 429 U.S. 875, 97 S.Ct. 197, 198, 50 L.Ed.2d 158 (1976).

The Supreme Court has conducted its sentence review and concluded Petitioner's death sentence was not excessive or disproportionate. Messer v. State, supra, at 326.

CONCLUSIONS OF LAW

With regard to Petitioner's second allegation, he has not shown that his death sentence was the result of any intentional discrimination. Smith v. Balkcom, supra.

Accordingly, these allegations are found to be without merit.

13

Petitioner's "prosecution-prone" argument was rejected in Smith v. Balkcom, supra.

14

In count 14, Petitioner alleges that his conviction for kidnapping with bodily injury is

unconstitutional because the trial court charged the jury on simple kidnapping and thereby invalidates the aggravating circumstance based upon kidnapping with bodily injury.

FINDINGS OF FACT

In its charge to the jury, the trial court read the substance of the indictment as to kidnapping with bodily injury, specifically stating that "said accused did then and there inflict serious and grievous bodily injuries upon the said Rhonda Tanner, said injuries resulting in her death." (T. 485). The trial court later read the code section defining kidnapping. (T. 491).

CONCLUSIONS OF LAW

There is no code section expressly defining kidnapping with bodily injury. Furthermore, there is no requirement that the words "bodily injury" be defined as it is a term of common usage. Smith v. State, 236 Ga. 5 (1976). Thus, in light of the language from the indictment and the statutory definition of kidnapping, the jury was clearly instructed as to kidnapping with bodily injury and never told they could elect to find Petitioner guilty of kidnapping.

The Court finds the conviction of kidnapping with bodily injury, and the aggravating circumstance and sentence based thereon, to be proper.

Accordingly, this allegation is found to be without merit.

WHEREFORE, the claims for relief in the amended petition having been found to be without merit, the petition, as amended, is denied.

SO ORDERED, this 25th day of February, 1982.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURT
FLINT JUDICIAL CIRCUIT

IN THE

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PETITION FOR WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

I hereby certify that on this 16 day of July, 1982, one copy of the Petition for Writ of Certiorari was mailed, postage prepaid to Ms. Mary Beth Westmoreland, Assistant Attorney General, Law Department, 132 State Judicial Building, 40 Capital Square, Atlanta, Georgia 30334; Counsel for Respondent. I further certify that all parties required to be served have been served.

HOWARD J. MANCHEL
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 82-5086

JAMES E. MESSER, JR.

vs.

WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, James E. Messer, Jr., who is now in the custody of Walter D. Zant, Warden, Georgia Diagnostic and Classification Center, asks leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's affidavit in support of this motion is attached hereto.

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(404) 522-1701

IN THE

SUPREME COURT OF THE UNITED STATES

NO.

JAMES E. MESSER, JR.

vs.

WALTER D. ZANT, Warden, Georgia
Diagnostic and Classification Center

AFFIDAVIT

I, James E. Messer, Jr., being first duly sworn according to law, depose and say, in support of my Motion for Leave To Proceed without being required to prepay costs or fees: 1. I am the Petitioner in the above entitled cause. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

I was sentenced to death by electrocution by a Superior Court Judge in Polk County, Georgia, on the charge of murder. The present proceeding was commenced on a petition for habeas corpus filed in the State Court on the ground that my arrest was illegal, being without probable cause and that my subsequent confession was obtained in violation of my constitutional rights.

James E. Messer Jr.
JAMES E. MESSER, JR.

Duly sworn and sworn to
before me, a Notary Public,
this 12 day of July, 1982.

H. D. Marshall
Notary Public

BC cyrl

ORIGINAL COPY

NO. 82-5086

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES E. MESSER, JR.,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the state habeas corpus court properly relied upon an adequate and independent state ground thus precluding review of the issue presented.

2.

Whether the state courts properly determined that there was probable cause for the arrest of the Petitioner.

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Cases Cited: **Page(s)**

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, James E. Messer, Jr., was indicted in Polk County, Georgia during the November Term, 1979 for the kidnapping with bodily injury and the murder of Rhonda Tanner. (R. 21). A special plea of insanity was filed on behalf of the Petitioner, but psychiatric examinations concluded that Petitioner was mentally competent to stand trial and criminally responsible at the time of the crime. Subsequently, the special plea of insanity was withdrawn. (R. 34). Following a trial by jury, Petitioner was found guilty on both charges and sentenced to the death penalty. The jury found that the murder was committed while engaged in the commission of another capital felony, that

being kidnapping with bodily injury and that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim. See Ga. Code Ann. § § 27-2534.1(b)(2) and (7). (R. 79-81).

A motion for new trial was subsequently denied and a notice of appeal was filed on June 11, 1980. On direct appeal, the Supreme Court of Georgia considered some six issues and considered the death sentences that were imposed. The court affirmed both the convictions and sentences. Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981). Petitioner's motion for a rehearing was denied by that court on March 18, 1981.

After the decision of the Supreme Court of Georgia was rendered, the Petitioner filed a petition for a writ of certiorari in this Court. This petition was denied on October 5, 1981. Messer v. Georgia, ___U.S.___, 102 S.Ct. 367 (1981).

Petitioner then filed a petition for a writ of habeas corpus in the Superior Court of Butts County on January 5, 1982. Relief was denied by that court on February 23, 1982. The application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 20, 1982.

The instant application was then filed challenging the decision of the state habeas corpus court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE STATE HABEAS CORPUS COURT PROPERLY RELIED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND IN DENYING RELIEF ON THE ISSUE OF PETITIONER'S ARREST.

Petitioner has challenged the legality of his arrest and the admission of statements he alleges were made subsequent to that arrest. In considering this issue, the state habeas corpus court did not decide the question on the merits, but cited to the decision of the Supreme Court of Georgia on direct appeal. The court noted that the Supreme Court of Georgia had already determined that there was no merit to this allegation. Messer v. State, supra, at 319. The state habeas corpus court then concluded, "findings of the appellate courts are binding upon this Court for purposes of review. Elrod v. Ault, 231 Ga. 750 (1974)." (Habeas corpus order at 2.) Thus, the court whose decision Petitioner seeks to have this Court review did not address the issue on the merits, but relied on an independent state ground to deny relief.

This Court should not take jurisdiction to review an alleged federal constitutional question when the decision of the state court did not rest upon a federal ground, but rested upon an adequate and independent state ground. See Stembridge v. Georgia, 343 U.S. 541 (1952). The proper time to challenge the decision of the Supreme Court of Georgia on direct appeal was in the petition for a writ of certiorari following that decision, not in the present petition which is only appropriately addressed to the decision of the state habeas corpus court. The state

habeas corpus court did not address the merits of this claim as it was bound under Georgia law to the decision previously entered by the Supreme Court of Georgia. Thus, in the decision being challenged in the present case, the court relied upon an adequate and independent non-federal ground to deny relief.

II. THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT PETITIONER'S CONFESSION WAS ADMISSIBLE.

In reviewing the question of probable cause in this case, it is essential to consider the pertinent facts presented.

On the morning of February 13, 1979, Rhonda Tanner, who was eight years old, left her home and went to elementary school in Cedartown, Georgia. Normally, Rhonda rode a bus to and from school; however, on that day, at approximately 2:30 p.m., the Petitioner, Rhonda's uncle, arrived at her school to pick her up. He was driving his own car identified as a 1966 Pontiac with tag number RUP-779. Petitioner told the school principal that Rhonda's father had been injured at his construction job and that her mother sent the Petitioner to pick up the little girl. Rhonda left school with the Petitioner and was never seen again.

When Mrs. Tanner became concerned at her daughter's failure to return home, she contacted the school principal. The principal described the man who picked up her daughter. Mrs. Tanner then contacted her mother-in-law and Petitioner's wife who stated she did not know any reason why the Petitioner would pick up Rhonda.

On February 13, 1979, Robin Slides was driving down Old Mill Road at approximately 3:35 p.m. and noticed a Pontiac parked on the side of the road near the railroad tracks. He saw a man walk away from the railroad tracks a few minutes later. He then reported the incident to the police the next day and identified Petitioner's car. The victim's body was subsequently discovered in this area.

On February 14, 1979, the school principal and two other witnesses from the elementary school identified a photograph of the Petitioner as the man who took Rhonda from school on the preceding day. At approximately 6:00 p.m. on February 14, 1979, G.B.I. Agent Longino, F.B.I. Agent Leary and Cedartown Police Officer Dean went to a trailer on Rockmart Highway to talk with the Petitioner. Petitioner voluntarily agreed to follow the officers to the police station where he gave a statement and signed a waiver to search his home. (T. 278, 364, 394, 398). He was not under arrest at that time. Petitioner subsequently made a confession at which time he was arrested by the authorities.

On direct appeal, the Supreme Court of Georgia made numerous factual findings. The court specifically found that Petitioner and his wife voluntarily accompanied G.B.I. Agents to the police station for questioning. The court also found that Petitioner was not under arrest at that time, even though he was given his Miranda warnings and did sign a waiver form. A confession was made only after the Petitioner was identified as the person who took his niece from the elementary school. The court found that Petitioner voluntarily accompanied the officers to the police station and was free to leave at any time. Messer v. State, 247 Ga. at 320. He was placed under arrest only after the confession was made.

The evidence at trial shows that Petitioner was advised by at least one officer that he was free to leave and was not under arrest. He went voluntarily to the police station in order to specifically make a statement. Further facts were developed which also showed probable cause to arrest prior to the time the statement was made. The police officers knew that Petitioner was the last one seen with the victim before her death. It was also known that the Petitioner concocted a story about the victim's father being injured in order to pick up the victim at school. Petitioner's car was also identified as having been in the location where the body was subsequently found. Thus, all of this evidence shows that there was a probable cause to arrest.

"Probable cause for an arrest exists where the facts and circumstances within the knowledge of the arresting officer and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." United States v. Ashcroft, 607 F.2d 1167, 1170 (5th Cir. 1979), citing Brinegar v. United States, 338 U.S. 160 (1949). The evidence should be viewed in a light most favorable to the verdict.

The evidence in the instant case shows that no arrest actually occurred until after the confession was made by the Petitioner. Therefore, his statement could not have been the product of any alleged illegal arrest. Furthermore, even had an arrest taken place prior to the time the confession was made, it is clear that there was probable cause to justify the arrest of the Petitioner before he made the confession based on the evidence the police received from other sources. Therefore, this Court should decline to grant review on this issue.

CONCLUSION

For the above and foregoing reasons, Respondent asserts that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this date served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

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This 17th day of August, 1982.

Mary Beth Westmoreland
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